Case No. 99 B 145

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dan Hupp,

Complainant,

٧.

Department of Higher Education, Colorado Historical Society,

Respondent.

Hearing on this matter was commenced on September 9, 1999 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. Hearing in this matter continued on December 9 and December 10, 1999.

MATTER APPEALED

Complainant, Dan Hupp ("Complainant" or "Hupp") appeals his reduction in hours from 40 hours per week to 20 hours per week, from 1.0 FTE to .5 FTE, by the Department of Higher Education, Colorado Historical Society ("Respondent" or "CHS").

For the reasons set forth below, the actions of Respondent are modified.

PRELIMINARY MATTERS

Respondent was represented by Stacy Worthington, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Respondent's Advisory Witness for the proceedings was Dianne Huling, Director of Information Technology, Colorado Historical Society, Denver, CO.

Complainant was represented by Vonda Hall, Esq., 1145 Bannock Street, Denver, CO. Complainant was present for the evidentiary proceedings.

Procedural History

Complainant's Notice of Appeal was filed on June 14, 1999. Complainant appealed the action of Respondent in which his position was reduced from full-time to part-time, in essence amounting to a partial layoff.

Hearing in this matter was initially set for July 29, 1999. Pre-hearing motions were filed to extend the time for commencing discovery. Said motions were granted in part. Respondent initially requested the matter be commenced and vacated. That motion was granted for good cause on July 9, 1999. Hearing for this matter was re-set for September 9, 1999.

Subsequently, the parties engaged in a discovery "battle." Oral argument on the parties' motions regarding discovery was held on or about October 6, 1999. As a result of the discovery dispute, a detailed order from the administrative law judge was issued on October 12, 1999. After providing a detailed background and a review of the pleadings associated with the discovery dispute, and reviewing the oral arguments, the order provided: (1) that the parties were to complete discovery no later than October 20, 1999; (2) what was to be included in the Respondent's production of documents; and (3) that Complainant was to be awarded attorney fees and costs. The deadlines for completing prehearing statements were extended to account for the discovery dispute and its resolution.

The parties complied with Board Rule R-8-55, 4 CCR 801 (1998) and attempted to resolve this matter with alternative dispute resolution.

Complainant's Motion to Sequester Witness was granted on September 9, 1999. Respondent's and Complainant's counsel were instructed to advise witnesses of the sequestration order.

Witnesses

Complainant called the following witnesses in its case-in-chief

#	Name	Position and Location
1	Georgianna Contiguglia	President, Colorado Historical Society
		Denver, CO
2	Kevin Gramer	Director, Denver Regional Museums
		Colorado Historical Society

		Denver, CO
3	Jack Armstrong	Controller, V.P. Financial Affairs
		Colorado Historical Society
		Denver, CO
4	Larry Zeschin	Colorado Historical Society
		Denver, CO

Respondent called the following witnesses in its case-in-chief:

#	Name	Position and Location
1	Georgianna Contiguglia	President, Colorado Historical Society
		Denver, CO
2	Diane Huling	Director, Informatio n Technolo gy
		Colorado Historical Society
		Denver, CO

No rebuttal witnesses on behalf of Complainant were called.

Exhibits

The following exhibits were introduced by Complainant during its case-in-chief:

Exhibit #	Туре	Comments
A	Letter to Dan Hupp from G. Contiguglia 5/17/99	Admitted with no objection
D	Position Description Questionnaire General Building Trades Assistant 5/19/99	Admitted with stipulation that first page of exhibit, as identified, would be excluded.
F	Position Description Questionnaire Maintenance Mechanic	Admitted with testimony of Complainant
G	Memo to Dan Hupp from Diane Huling 1/11/99	Admitted with no objection
Н	Network Administrator worksheet	Admitted with no objection
N	Organizational Chart (part) Collections and Exhibition Div., CHS 3/13/99	Admitted with no objection
0	CHS-Business Plan 5/3/99	Admitted with no objection
Р	Organizational Chart (part) Div. of Collections Services 7/1/99	Admitted with no objection
V	General Ledger CHS	Admitted over objection based on relevancy
	FY 1999 (through 6/16/99)	

The following exhibits were introduced by Respondent during its case-in-chief:

Exhibit #	Туре	Comments
1	Memo to Dan Hupp from G. Contiguglia 8/25/97	Admitted with no objection
6	To Whom It May Concern: (no date)	
25 (also	Position Description Questionnaire	Admitted with no objection
Comp.'s EX. J)	IT Network Administrator/Webmaster	
	6/1/99	
28	Organization Chart (part)	Admitted with no objection
	Division of Collections Services	•
	4/9/99	

Motion to Dismiss

At the conclusion of Complainant's case-in-chief, Respondent moved that the matter be dismissed with prejudice based on the argument that Complainant failed to meet its burden of proof that by a preponderance of the evidence Respondent's action was arbitrary, capricious, and/or contrary to rule or law. Respondent argued, in part, that Hughes v. Dept. of Higher Education, 934 P.2d 891 (Colo. App. 1997) supported its motion. Complainant argued that the matter should not be dismissed with prejudice based on an interpretation of Young v. Department of State, 95 CA 1761 (September 26, 1996).

Respondent's motion was DENIED based on C.R.C.P. 41 and the administrative law judge declining to rule until the close of evidence.

<u>ISSUES</u>

- Whether the action of Respondent, reducing Complainant's hours from 40 hours/week to 20 hours/week, from 1.0 FTE to .5 FTE, was arbitrary, capricious, and/contrary to rule or law.
- Whether either party is entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999).

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

Applicable Rules and Statutes

Board Rule R-7-2, 4 CCR 801 (1998) provides, in part:

The governor, director, and all appointing authorities are encouraged to explore and, when appropriate in their discretion, implement innovative alternatives to minimize or avoid the need for layoffs of employees in the state personnel system. As part of this, they are encouraged to explore alternative placement into vacant positions and/or other jobs for those who are laid off or displaced as a result of layoff. In addition, retention areas are encouraged to retrain existing employees when possible and feasible.

Board Rule R-7-4, 4 CCR 801 (1998) provides in part that in making layoff decisions, and in order to mitigate potential impact on the diversity of the work force, departments are encouraged to consider other factors such as source of funds in determining layoffs.

Board Rule R-7-8, 4 CCR 801 (1999) provides:

The only reasons for layoff are lack of funds, lack of work, or reorganization. Layoffs may result from reorganization which represents a change in the fundamental structure, positions, and/or functions accountable to one or more appointing authorities. A business plan documenting the reorganization shall be posted in a conspicuous place before the first layoff notice is issued. This plan must include an organizational chart, the reasons for the change, the anticipated benefits and results, and, at least in general terms, the expected changes and their effects on employees.

The Board Rules embody the provisions of CRS 24-50-124 (1999).

The Colorado Revised Statutes provide for personal service contracts under two distinct provisions. CRS 24-50-504 (1998) addresses the issue personal services provided by non-classified employees. It provides in part:

Personal services contracts for employees or independent contractors are permissible when the functions contracted are otherwise performed by persons exempt from civil service by section 13 of article XII of the state constitution or by statutes enacted pursuant thereto.

Personal services contracts that create an independent contractor relationship are permissible when the state personnel director determines that . . . the following conditions are met:

- (d) The services are incidental to a contract for the purchase or lease of real or personal property. Contracts under this criterion, known as "service agreements", include, but are not limited to, agreements to service or maintain equipment, computers, or other products that are entered into in connection with their original lease or purchase. . .
- (f) The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

CRS 24-50-503 (1998) is not applicable in this instance in that it is only effective when CRS 24-50-504 is not applicable.

Respondent's Background

CHS is the state department charged with protecting "Colorado's memory." It has various divisions in charge of preserving Colorado artifacts, operating the State Historical Fund, and providing library services. At the time in question, the president of CHS was Georgianna Contiguglia. Contiguglia had been with CHS since 1980 and has been President for the past 2 and ½ years. (Contiguglia). She was the appointing authority in this matter.

One division of CHS includes the Colorado History Museum ("CHM").

In addition, CHS has various other divisions including the Denver Regional Museums ("DRMs"). The DRMs includes three mansion-type facilities located in the Denver metro area known as the Grant-Humphreys Mansion, the Byers-Evans House Museum, and the Pearce-McAllister Cottage. (Contiguglia, Ex. D). The Director of the DRMs has been Kevin Gramer. He has been employed by CHS since 1989. His duties include supervising personnel who maintain the properties. (Gramer).

Prior to July 1999, it is unclear as to whether some type of Information Technology division existed separately from CHS' other divisions.

The DRMs required maintenance and upkeep conducted, in part, by a General Building Trades Assistant and/or Maintenance Mechanic. Such upkeep included maintenance and repair of interior and exterior spaces.

The General Building Trades Assistant/Maintenance Mechanic position was a part-time position for the DRMs. In order to create a full-time position, the position was broadened to include providing services to the CHM. (Gramer).

Twenty-four hours per week, the position was to work for the DRMs. The other two days or sixteen hours was dedicated to providing services to CHM. The hours between the divisions would sometimes vary depending upon the needs of the DRMs or CHM. (Gramer, Ex. 1).

Jack Armstrong has been the CHS department controller since 1981. His responsibilities include participating in CHS finances and budgeting. (Armstrong). In so doing, he and his staff throughout the department account for all financial transactions through a general ledger system and the Colorado Financial Reporting System ("COFRS"). Any fees paid to contractors would be included in the COFRS reporting.

Prior to 1999, CHS did not have an integrated computer network whereby individual employees could communicate, share data, etc., amongst the various CHS locations. Instead, the department had individual stand-alone personal computers that were not connected to any type of network. (Huling, Hupp).

III. Complainant's Background

Dan Hupp has been employed by the state of Colorado for the past 17 and ½ years. Prior to July 1, 1999, Complainant's position was a full-time (1.0 FTE) General Building and Trades Assistant. (Hupp, Ex. 6). Prior to that classification, Hupp was a Maintenance Mechanic and General Services Assistant. (Hupp).

Before July 1, 1999, a majority of Hupp's time was spent providing maintenance support to the DRMs. In addition, he would provide audio-visual support for the DRMs and CHM. Such support would amount to 20% of his time. (Hupp, Ex. F).

As a full time employee, Hupp supported both CHM and the DRMs, in part, by "pulling wire," installing individual/stand alone PCs, setting proper parameters on the connecting PCs, and maintaining the PCs. (Hupp, Ex. F). Approximately 3/5 of Hupp's time was allocated to providing support to the DRMs and 2/5 of his time was spent supporting CHM and its limited information technology needs.

His responsibilities also included those described above for a General Building Trades Assistant/Maintenance Mechanic position.

Events of the Layoff

In 1996, the Board of Directors of CHS adopted a long range plan which included upgrading the technology, and the technological services, at CHS. The plan included establishing a specific Information Technology ("IT") division, and creating both a local-area computer network ("LAN") and a wide-area network ("WAN"). (Contiguglia, Huling, Ex. H).

The Information Technology division was to help: (1) facilitate communications between the various CHS locations throughout the state; (2) provide internet

access to CHS' resources for the public; and (3) provide one or more web pages on the internet related to CHS and/or the services it provides.

Under Contiguglia, the IT division was created and included the position for Director of IT. (Contiguglia).

The Director of IT, Diane Huling, was hired in July 1998. Her responsibilities include preparing annual IT management plans, setting budgets, establishing training, and overseeing contracts and other agreements. Huling participated in designing the "new" IT division which included development of a Network Analyst position. (Huling).

The Network Administrator (a/k/a Network Analyst) position was to include, in part, the following responsibilities:

- -To provide technical support, security administration, data integrity, and training over applications of internet and intranet for CHS; and
- -Oversee administration of the computer network, research, test and evaluate and decide what software packages and computer equipment for CHS were appropriate.

(Ex. 25, Ex. H, Ex. J). This position was at the IT Professional IV level. Huling determined that this level of expertise was needed.

In implementing the long range plan, CHS needed to approach the Joint Budget Committee in order to ask for additional monetary resources and 3 additional FTE-positions. (Contiguglia). Some testimony was provided to the JBC during the 1999 legislative session.

While the JBC provided some additional resources and supported the creation of an FTE for Director of IT, it did not provide enough resources for CHS to completely implement its long range plan. If CHS was to fully implement its plan and establish an IT division with staff, some of the resources necessary would have to be "tapped" from other divisions. (Contiguglia). These resources would generate the FTE and salary associated with the Network Analyst position. (Contiguglia, Huling).

Contiguglia relied upon Huling to determine the most expeditious means of implementing the long range plan. (Contiguglia). In July 1998, CHS began installing its local area network ("LAN"). (Ex. O). Such a network was integrated and was a mechanism for allowing communications and data transfer amongst the various CHS divisions. New computer hardware was installed as part of the process, replacing the old equipment maintained by Hupp.

With the implementation of the long range plan, and a shortage of resources, Huling determined that Hupp's position had to suffer a reduction in hours or layoff. (Huling). Hupp's responsibilities, in part, were no longer required. The

department no longer needed FTE dedicated to supporting the stand-alone PCs. The new LAN and WAN environment required the Network Analyst expertise.

The reduction in Hupp's hours was the result of lack of work (Ex. G).

By reducing Hupp's hours from 40 hours/week to 20 hours/week, CHS could shift that FTE and its funding so as to support, in part, the Network Analyst position. (Contiguglia, Huling).

Huling alerted Hupp to the changes in the IT division by memo on January 11, 1999. (Huling, Ex. G). In so doing, Huling noted that there would be a reduction in his hours based on 15% of his time having previously been dedicated to audiovisual support and 20% of his time being dedicated to supporting the old computer environment. This reduction represented an actual decrease in responsibilities/work by 35%. Contiguglia did not approve the memo but the hours were reduced.

Huling did not consult with anyone else in determining the reduction in hours for Hupp and specifically determined that there was no time to provide any education or training for Hupp in order for him to qualify for the Network Analyst position. (Huling).

This memo was the first notification to Hupp about a reduction in hours. (Hupp). The reduction in hours was to occur throughout the first half of 1999.

Part of the Network Analyst position was supported by FTE and funding from the Books and Manuscripts division of CHS and part was to be funded by the savings and FTE generated by Hupp's reduction in hours. (Contiguglia).

Eventually, the president of CHS also decided that because of the need for implementation, no training would be provided to allow Hupp to fill the Network Analyst position. The department filled the position through a lateral transfer from the Department of Natural Resources. The position was never announced. (Contiguglia).

On or about March 12, 1999, an organization chart was drafted reflecting Hupp's title, and part-time responsibilities, with the Collections and Exhibitions Division of CHS, which included the DRMs. (Ex. N). The chart reflects that .5 FTE for Hupp's position was to be dedicated to DRMs. (Contiguglia).

At the end of March 1999, Gramer re-wrote Hupp's Position Description Questionnaire reflecting Hupp's reduced hours, and reflecting how Hupp was to allocate his time with the DRMs after his hours were reduced. The PDQ did not include any responsibilities with CHM or include any IT responsibilities. (Gramer, Ex. D).

In May 1999, CHS published an IT Business Plan. (Ex. O). It was published by posting it in one building maintained by CHS. It was not distributed to any other of CHS locations or localities.

On May 17, 1999, Contiguglia notified Complainant that because of a reorganization of the IT division, his position with the department would be reduced from 1.0 FTE to .5 FTE and that .5 FTE would be dedicated to the DRMs, effective July 1, 1999. He would report to Gramer. (Ex. A). The letter provided appeal rights, and indicated Complainant's options with regard to being on the department's reemployment list.

Over the course of time, audio-visual equipment at CHS was upgraded.

DISCUSSION INTRODUCTION

Respondent's action of reducing Complainant's FTE is an action appealable to the State Personnel Board. In this administrative action affecting a certified state employee, the burden of proof is on the employee, **not the employer**, to show by a preponderance of the evidence that Respondent's acts or omissions were arbitrary, capricious, or contrary to rule and/or law. See: *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); *Hughes v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. 1997).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

- A witness' means of knowledge;
- A witness' strength of memory;
- A witness' opportunity for observation;
- The reasonableness or unreasonableness of a witness' testimony;
- A witness' motives, if any;
- Any contradiction in testimony or evidence;
- A witness' bias, prejudice or interest, if any;
- A witness' demeanor during testimony:

All other facts and circumstance shown by the evidence which affect the credibility of a witness.

All of these factors were considered in evaluating witnesses' testimony.

II.

Grounds for Layoff

In this matter, Complainant is required to demonstrate by a preponderance of the evidence that Respondent's action in reducing the number of work hours with Complainant's position was arbitrary, capricious, and/or contrary to rule or law. As provided in Board Rule R-7-8, 4 CCR 801 (1999), a certified employee can be subject to layoff (or a reduction in hours) for: (1) lack of funds, (2) lack of work, or (3) reorganization. Tension exists as to whether the three grounds for layoff are exclusive. In other words, it can be interpreted that while layoff or a reduction in hours could occur for lack of work, it could also occur because of lack of work and reorganization. Recent case law addresses circumstances in which reorganization has been accompanied by either a lack of funding and when reorganization has occurred independently of a lack of funds or lack of work.

In Frederick C. Young and State Personnel Board v. Department of State, 95 CA 1761 (September 26, 1996) (an unpublished decision), the Colorado Court of Appeals explored the issue of layoff based solely on reorganization. In that case, the erroneous misclassification of an employee lead to that employee's layoff as the result of a reorganization of the Department of State. The court determined that while the reorganization had been appropriately conducted for the Department, such did not cure the arbitrary, capricious and/or contrary to rule or law reclassification of the position, which in turn lead to the abolition of the position. In so ruling, the court stated that "the Department's notice to the employee stated only that his layoff was because of reorganization of the Department. . . the Department is bound by the terms of the notice and cannot" subsequently seek to sustain the layoff on other grounds. Young at p. 6.

Subsequent to *Young*, a different division of the Court of Appeals issued a decision in *Hughes and the State Personnel Board v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. 1997). This case involved a layoff linked to a lack of funding. The layoff in this case was precipitated by a budget shortfall. After having created a budget committee to "hunt" for fiscal savings within the agency, it was determined some savings to alleviate the budget shortfall could be identified by elimination of Hughes' position. While this case involved "bumping rights" and allegations of discrimination, the ALJ eventually determined that the layoff of Hughes was arbitrary and capricious, in relevant part, because the budget committee had failed to consider the agency's vision statement, the job performance and job contribution of the individuals whose positions were abolished and issues of diversity and discrimination in recommending the elimination of positions. The Board adopted the ALJ's findings and conclusions. The Court of Appeals reversed the Board's order. In so doing, the court

determined that in the event of reorganization, employees be protected and accorded rights. The court specifically cited that reorganizations can be abused when implemented for the purpose of terminating a disfavored or targeted employee or group of employees. However, the court also determined that the actions and decisions of the agency related to, among other things, its goals, its values, its priorities, and matters of administrative efficiency and style are issues peculiarly addressed to the discretion of the agency. *Hughes* at 894. The court established that the decisions and acts of an agency in reorganizing itself, allocating its resources, and meeting its budgetary contingencies must be affirmed on review if there is a rational basis for the action taken.

The court further held that in determining whether to reduce a classified employee's hours, based on a reorganization of the particular appointing authority's division and a lack of funds, it was not within the province of an administrative law judge, or the Board, to operate or second-guess an agency in making decisions which are based on intertwined, and conflicting, policy grounds. Great deference has to be given to the agency because in its decision-making capacity, not only are matters of budget and administration relevant factors but so are matters related to the services and future goals of the agency. So long as a rational basis exists for the decision or action taken, the agency should be upheld.

Hupp's Reduction in Hours and the Agency's Reasons

The tension previously identified which involves layoffs/reduction in hours and the reasons for such layoffs/reduction in hours permeates this matter.

1. Lack of Work as the Reason for Hupp's Reduction in Hours

Complainant's hours were **not** initially or solely reduced as the result of a formal reorganization. As demonstrated by Exhibit G and the testimony of Huling and Contiguglia, Hupp's hours were reduced because of a lack of work in one particular division of CHS. As stated in Huling's memo to Hupp on January 11, 1999, not all of his services were needed because:

As the number of PCs and peripherals in the old (computer) environment diminishes, the need for (Hupp) to work in the IT Department will also diminish;

As the old computer environment continues to shrink, (Hupp's) time in IT will decrease; . . .

Huling will no longer need (Hupp's) assistance in IT.

The *entire* skill set that Hupp provided was no longer needed as a result of obtaining new computers, a new computer network and obtaining manufacturer warranties to support such systems. Given the nature of the computer network, a LAN and WAN based system, the individual support associated for the standalone PCs was no longer necessary. Hupp's workload was reduced.

With the lack of work as the reason for the reduction in hours, one must determine if there was a rational basis, as provided by *Hughes*, for the *full* .5 reduction in hours. In this case, based on the evidence introduced, it cannot be argued that the reduction of hours from 40 to 20 hours per week, a .5 FTE, can be rationally supported.

As the Position Description Questionnaire (Exhibit F) in effect prior to the reduction in hours and Huling's memo demonstrate, between 15% and 20% of Hupp's time was to be devoted to installing and maintaining computer systems by running wire, installing connectors and setting proper parameters of connected equipment. In Huling's memo to Hupp, it was also noted that Hupp would no longer have responsibilities for audio-visual support which accounted for another 15% - 20% of his time. This was a result of the IT division within CHS no longer supporting the agency's audio-visual needs. Thus, based on the evidence, Hupp's position was being reduced by up to 20% as a result of a lack of work and up to another 20% as a result of the IT division no longer supporting CHS audio-visual needs, for a total of no more than 40%.

From the perspective of duties, Huling admitted that there was a lack of computer related duties for Hupp. But, she also admitted she was not familiar with what happened to the audio-visual duties which were also eliminated. (Exhibit G). She only knew that her IT division was not to provide the services. She distributed the memo to Hupp suggesting the reduction in hours and identifying the reduction in computer and audio-visual duties. In other words, there was no demonstrated lack of work or rationale provided vis-à-vis audio-visual duties. Complainant has demonstrated by a preponderance of evidence that no rational decision could have been consciously made by the appointing authority regarding the re-assignment of the audio-visual duties for lack of work since the appointing authority admittedly relied on Huling's analysis.

From a funding perspective, it also appears that there was no rational basis for reducing *Hupp's* hours a full .5 FTE. As Contiguglia testified in Respondent's case-in-chief, new audio-visual equipment had been purchased and there was less of a need for support of a/v equipment. But, at the same time, the appointing authority testified that Complainant's audio-visual duties accounted for 30-40% of his time before July 1999. Such an understanding of the time spent with audio-visual equipment is contradictory with Huling's memo and Hupp's Position Description Questionnaire. The appointing authority testified that no matter what amount of duties were reduced, the future budget shortfall associated with funding the Network Analyst position had to be made up and that such was accomplished by establishing that Hupp had a lack of work with IT and claiming a lack of work with audio-visual duties.

Complainant demonstrated by a preponderance of evidence that a **portion** of the reduction in hours was not rationally related to a lack of work. In the context of reducing an employee's hours for lack of work, the mere fact that the agency

may have a broad reason for reducing workload cannot be interpreted to allow the appointing authority to reduce work hours willy-nilly, with no clear understanding of an impact on employee's hours or duties and then take the funds associated with such a position and create a new position. Such actions do not amount to a layoff/reduction in hours for a lack of work In this instance, Hupp was first told his hours were being reduced for lack of work.

The record does reflect that Hupp's duties associated with computer installation and maintenance were no longer necessary. This is directly related to the fact that CHS restructured its IT division (i.e., reorganized) **and** there was a lack of work cause by establishing LAN/WAN computer systems requiring a Network Analyst. To the extent Hupp's hours and FTE were reduced to reflect this lack of work was appropriate. Based on the evidence provided, such a reduction in work amounted to approximately .2 FTE or 20%.

2. Formal Reorganization as a Secondary Reason for Hupp's Reduction in Hours

It is clear that the agency, CHS, established a clear vision and set of future goals relative to CHS providing improved technology to its own staff and the citizens of Colorado. As demonstrated by Contiguglia's testimony, the CHS Board established a long-term plan for improving its technological applications. The agency established future goals vis-à-vis technology. Moreover, the evidence strongly supports the fact that over a period of a few years, CHS was taking steps to implement its long-term plan in both administrative and budgetary arenas. Implementation of such a plan mandated that some level of formal reorganization was necessary.

The evidence demonstrates that the **formal notice** provided to Complainant regarding his total reduction in hours states directly that the reduction in hours was precipitated by a reorganization of one of the divisions within CHS. If one where to apply the *Young* doctrine, because the reduction in hours was triggered by a lack of work yet Complainant was formally notified that it was because of a reorganization of the division, the parameters of the layoff can only be reviewed in the context of a reorganization. While the "lack of work" rationale for reducing hours can be preserved and allow for a partial reduction in hours, the reduction in hours attributed to audio-visual work cannot be preserved. Board Rule R-7-8, 4 CCR 801 (1999) was not followed in that the formal notice of the reorganization, the Business Plan, was not posted in a conspicuous place and was insufficient for advising CHS employees of the reorganization. No full organization chart accompanied the published notice. The appointing authority admitted that she was not aware if the reorganization notice was ever posted so as to comport with Board rule.

In attempting to reconcile the various reasons for the reduction in hours (i.e., lack of work and reorganization), it must be found that Respondent's action was arbitrary, capricious, or contrary to rule and/or law. First, Respondent failed to comply with Board Rule R-7-8 by failing to adequately post the reorganization

plan and organizational chart. Had the reduction in hours been solely based on a reorganization, such a failure would invalidate the entire layoff. Yet, the record also clearly demonstrates that a portion of the reduction in hours was based not on a formal reorganization, but on a lack of work. To the extent that Hupp's hours were reduced because of a lack of work related to computer support duties, Respondent's actions should be upheld.

Complainant failed to meet its burden of proof that Respondent violated CRS 24-50-504 (1999). The only evidence on this issue was the testimony of Jack Armstrong and Exhibit V. Exhibit V, consisting of hundreds of pages of COFRS report may have indicated the use of private contractors. But, without further evidence, a determination as to any statutory violation cannot be made. See: Colorado Ass'n of Public Employees v. Department of Highways, 809 P.2d 988 (1991).

Finally, it must be noted that CHS failed to demonstrate any regard for Board Rule R-7-2. No substantial evidence was presented to demonstrate that (1) CHS considered implementing any innovative alternatives to minimize or avoid the need for layoff or the reduction in hours; or (2) the appointing authority affirmatively thought that no alternatives should be explored. CHS failed to elucidate any reasons besides the fact that it was "in a hurry" to implement the long-range plan.

CONCLUSIONS OF LAW

Respondent's action of reducing Complainant's hours and FTE by **50**% was arbitrary and capricious and contrary to rule or law. The Respondent's action should be modified.

No fees are to be awarded in this matter.

ORDER

Respondent's actions are modified. Complainant is to be re-instated such that his duties reflect a .8 FTE and be awarded back pay and benefits related thereto.

Dated this 21st	G. Charles Robertson
Day of January, 2000	Administrative Law Judge

Certificate of Service

This is to certify that on the day of January, 2000, I placed a true copy of the foregoing Initial Decision of the Administrative Law Judge and Notice of Appeal rights in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall, Esq. C.A.P.E. 1145 Bannock Street Denver, CO 80204

and by interdepartmental mail to:

Stacy Worthington Assistant Attorney General 1525 Sherman Street, 5th Floor Denver, CO 80203